

# Court without a Head

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Serhii Lashyn

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2021 is a year full of exciting anniversaries for Ukraine. On 24 August 2021, the nation celebrated thirty years since proclaiming its independence on the remnants of the fallen Soviet empire. On 28 June 2021, the country marked the 25<sup>th</sup> anniversary of its Constitution. And on 16 October 2021, the Constitutional Court of Ukraine will celebrate its 25<sup>th</sup> anniversary. Yet, while the previous two dates were indeed great occasions for celebration and pride, the Court's anniversary falls in the middle of a constitutional crisis of unprecedented scale and with no clear prospects of solution.

## The Court's Crisis: A Brief Recapitulation

[Alina Cherviatsova](#) and [Andrii Nekoliak](#) have reported extensively on the Court's crisis on this blog before. As a short recap, the crisis began on 27 October 2020, when the Court struck down a number of provisions in the [Law 1700-VII on the Prevention of Corruption](#) and cancelled criminal responsibility for declaring inaccurate information by those who have been required to do so under the said law. [According to the Court](#), the exercise of control over the judiciary by the National Agency for the Prevention of Corruption was unconstitutional since the Agency is an organ of the executive branch. As to the criminal liability, the Court found that the punishment for filing inaccurate declarations was excessive. Met with fury by the President and civil society, the decision was seen as a major and unexpected blow to the nation's efforts to combat corruption.

Since Alina Cherviatsova's latest [post](#), the crisis has not abated but even got worse, sending constitutional adjudication in Ukraine further down into the abyss of uncertainty. Just to give the readers a taste of the current situation: If you go to Kyiv these days and ask people who is the current Head of the Constitutional Court, you will get different responses even from persons with excellent legal education and acute awareness of the current affairs. In [this video](#) with the telling title 'Chaos at the Constitutional Court,' a journalist of Radio Free Europe/Radio Liberty, Serhii Andrushko, chases the judges of the Constitutional Court and asks them a straightforward question: 'Who is the Head of the Constitutional Court?' Judge Viktor Kryvenko [says](#) 'You'. Judge Vasyl Lemak [refers](#) the journalist to the Court's website. Judge Ihor Slidenko [suggests](#) going to the portrait gallery of the Court where the pictures of the sitting judges are on display. The Deputy Head Serhiy Holovaty also [refuses](#) to give a definitive answer, suggesting that it is up to the journalists, not to him, to decide who is now the Head of the Court.

## Counter-Intuitive and Unconstitutional

Why do the judges of the Constitutional Court refuse to answer such a simple question?

After having suspended the Head of the Court Oleksandr Tupytskyi at the end of 2020 due to a criminal investigation (as [reported](#) on this blog previously), President Zelenskyy took further action against the Court. On 27 March 2021, he issued [Decree 124/2021](#). That decree cancelled two decrees issued by the notorious President Yanukovych back in 2013 on the appointment of Oleksandr Tupytskyi and Oleksandr Kasminin to the Constitutional Court. The lengthy preamble explains the President's motivation and, among other things, cites matters of national security. As a consequence, Tupytskyi and Kasminin are no longer on the bench and their seats are vacant. Zelenskyy's decree is problematic for two main reasons. First and foremost, Yanukovych's decrees were not normative acts that were still in force; they were applied only once and then extinguished. It is simply counter-intuitive, if not illogical, to assume that a judge can be dismissed by cancelling the document on his appointment. Second, Article 149-1 of the [Constitution](#) stipulates clearly how the mandate of a Constitutional Court judge may be ended prematurely. Among other narrowly identified cases on the exhaustive list, the Constitution allows dismissing a judge by a two-thirds vote of the judges in case of a disciplinary violation. The Constitution surely does not allow the President to dismiss the judges, either by cancelling the decree on their appointment or in any other way.

Seeing the apparently unlawful nature of Zelenskyy's decree, Tupytskyi went to the place he knows best to navigate — the courtroom. Not surprisingly, on 14 July 2021, the Administrative Court of Cassation [annulled](#) the President's decree. About a month later, the President's representatives appealed the decision to the Great Chamber of the Supreme Court. While the appeal is pending, Zelenskyy's decree on sacking Tupytskyi remains technically in force. On this basis, the security guards outside of the building of the Constitutional Court continue to block Tupytskyi from physically entering the Court. In Tupytskyi's absence, the Deputy Head Serhiy Holovaty took over the daily management of the Court. Now, Tupytskyi and Holovaty *de facto* both exercise the powers of the Court's Head. They both issue orders (routine documents that structure the daily business of the Court): Tupytskyi, considering himself the Head of the Court, and Holovaty, considering himself the acting Head. Moreover, Tupytskyi sometimes annuls some of the orders issued by Holovaty. The Court's secretariat appears to duly register the orders of both. The ongoing situation of contested legitimacy may be properly described as dual power.

## Four Judges, Two Seats

While the appeal concerning Tupytskyi's sacking is still pending and the Constitutional Court finds itself between Scylla and Charybdis, one can hardly see a silver lining and the situation might get even more complicated. On 17 August 2021, President Zelenskyy issued [Decree 365/2021](#) and thereby launched a competition process for filling the two vacancies on the Court that, in his view, exist since the dismissal of Tupytskyi and Kasminin. Assuming that the President proceeds further with filling the alleged vacancies and the appeal is lost, there will be four judges who will claim the same two seats on the Court.

It is notable that the problem which launched the whole crisis has been solved in December 2020 when the Verkhovna Rada, the parliament of Ukraine, adopted

some legislative amendments necessitated by the decision of the Constitutional Court. The anti-corruption machinery functions again, so the crisis in its current form is thus more an outcome of a questionable understanding of the rule of law and the (much needed) attempt to reform the Ukrainian judiciary. Also importantly, there is barely any public support for the Constitutional Court. This is understandable. The Ukrainian judiciary has been ridden by corruption for decades, so public indifference to institutional attacks on the Constitutional Court is not coincidental as the reputation of judges is distinctively negative among citizens. Furthermore, in the twenty-five years of its existence, the Court failed to build public trust and respect that would have allowed it to take unpopular decisions without fearing a backlash. The media is full of investigations into the dealings of some of the sitting Constitutional Court judges; some of them show disturbing evidence of corruption and nepotism.

## Lost Reputation

But not only the public, academics also have shown little interest in defending the Court since the Court's jurisprudence failed to gain their trust and respect. An example at hand is its decision on the snap parliamentary election that took place in 2019 after President Zelenskyy's landslide victory (for a detailed analysis of the situation immediately after, see [here](#)). The legality of calling a snap election was challenged in front of the Court. In its [decision](#), the Court wrote that 'a constitutional conflict arose between the President of Ukraine and the Verkhovna Rada of Ukraine ... which has no legal solution.' As an answer, the Court suggested the 'resolution of the constitutional conflict by the people by means of holding an early election to the Verkhovna Rada.' In other words, the Court simply refused to rule on the legality of the parliament's dissolution by the President. Needless to say that the decision raised many eyebrows.

Notwithstanding how relatable and justifiable the actions of President Zelenskyy might be, his actions only deepen the crisis. The only way out is appointing new judges when the mandates of the current judges expire. The appointment has to be the outcome of a competitive process that ensures transparency and the faithfulness of the appointees. Also, it is of utter importance to lead effective and impartial investigations into the public accusations against the sitting judges. Their mandates will end prematurely if they are found guilty. Put shortly, a complicated problem requires a complicated solution and a legitimate body can be created only in a legitimate way.

One could hardly imagine a situation worse than this to meet the twenty-five-year milestone in the history of the Constitutional Court. Meanwhile, the German Federal Constitutional Court celebrates its seventieth anniversary this year, providing a stark contrast to its Ukrainian counterpart; at least, it is clear who the President of the Karlsruhe Court is. In June 2021, the Constitutional Court of Ukraine held four academic conferences to celebrate the 25<sup>th</sup> anniversary of the Constitution and its protection by the Court. At least judging from the [report](#) published on the

Court's website, everyone seemed to have managed celebrating Ukraine's fragile constitutionalism while ignoring the elephant in the room.

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